

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HAMI ABGHARI; ARON
MORTENSON; BRYANT DELZER,
and MICHAEL BOUCHARD,

Plaintiffs,

vs.

AACRES ALLVEST, a
corporation; and AACRES
WASHINGTON, LLC,

Defendants.

NO. CV-08-0075-LRS

ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT DISMISSAL

BEFORE THE COURT is Defendants' Motion For Summary Judgment Dismissal, Ct. Rec. 35, filed on January 20, 2009 and noted, without oral argument, for March 13, 2009.

Plaintiffs have brought this lawsuit alleging that Defendants failed to pay eight (8) hours of overtime compensation after the Plaintiffs had worked 24 hours for eight (8) consecutive days. This conduct, Plaintiffs complain, violates 29 U.S.C. § 201 et. seq., Fair Labor Standards Act ("FLSA").

A. Dismissal of Defendant Aacres Allvest Corporation

Defendants argue that summary judgment dismissal as to Defendant Aacres Allvest corporation is appropriate based on lack of existence

1 of such corporate entity. Ct. Rec. 35 at 2-3. Defendants state that
2 Plaintiffs have sued a non-existent entity Defendant Acres Allvest
3 corporation and this named Defendant was not Plaintiffs' employer.¹
4 Defendants submit W-2 forms in support of the motion for summary
5 judgment dismissal. Ct. Recs. 49, 52.

6 Defendants state that Plaintiffs argument relating to the
7 survival statute for claims against a dissolved corporation is
8 irrelevant as the corporation never existed and therefore could not be
9 dissolved.

10 Based on the evidence before the court, it appears that the
11 limited liability corporation employed the Plaintiffs. It is
12 therefore appropriate that Defendant Acres Allvest corporation be
13 dismissed as requested by Defendants.

14 **B. Dismissal of Plaintiff Bouchard Based on Failure to Participate**
15 **in Discovery**

16 Defendants also argue that the claims of Defendant Michael
17 Bouchard should be dismissed based on his failure to participate in
18 discovery. Defendants state that on November 19, 2008,
19 interrogatories and requests for production were directed to Plaintiff
20 Bouchard and to date, he has not responded to those discovery
21 requests. Further, when scheduling the deposition of Plaintiff
22 Bouchard, opposing counsel's office advised that Plaintiff was out of
23 the country. Finally, Defendants point out that Plaintiff Bouchard
24 has not opposed this motion for summary judgment dismissal.

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26 ¹The Declaration of Rex A. Garrett provides that Plaintiffs were
27 employed by Acres/Allvest Limited Liability Company up until June 28,
2007. Ct. Rec. 37.

1 The trial court has broad discretion in imposing sanctions
2 against party who fails to comply with a discovery order, though that
3 discretion is limited where ultimate sanctions of dismissal or entry
4 of default judgment are concerned. Under Fed.R.Civ.P. 37(b)(2), the
5 district court may dismiss an action as a sanction for failure to
6 "obey an order to provide or permit discovery." Dismissal is,
7 however, a harsh penalty which should not be imposed except in extreme
8 circumstances. *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585,
9 589 (9th Cir.1983).

10 The foregoing notwithstanding, Plaintiff Bouchard's complete
11 failure or unavailability to respond to discovery requests has
12 continued for approximately 4 months on a matter which is scheduled
13 for trial less than 60 days from the current date. Such a state of
14 affairs is inherently prejudicial to the Defendants. The Court
15 concludes that his claims should therefore be dismissed without
16 prejudice.

17 Accordingly, **IT IS ORDERED** that:

18 1. Defendants' Motion For Summary Judgment Dismissal, **Ct. Rec.**
19 **35**, is **GRANTED in part** and **DENIED in part**. Defendant **AACRES ALLVEST**
20 **corporation is DISMISSED without prejudice.**

21 2. Plaintiff Michael Bouchard and the claims he has asserted are
22 dismissed without prejudice.

23 **IT IS SO ORDERED.** The District Court Executive is directed to

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enter this Order and provide copies to counsel.

DATED this 13TH day of March, 2009.

S/ Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE